

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

RIGOBERTO JESUS CONTRERAS,

Petitioner,

v.

JEFFERY UTTECHT,

Respondent.

CASE NO. 3:14-CV-05705-BHS-DWC

REPORT AND  
RECOMMENDATION

Noting Date: July 10, 2015

The District Court has referred this action to United States Magistrate Judge David W. Christel. Petitioner filed his federal habeas Petition ("Petition"), pursuant to 28 U.S.C. § 2254, seeking relief from a state court conviction. The Court concludes the Petition is time-barred and Petitioner is not entitled to equitable tolling. Accordingly, the Court recommends the Petition be dismissed with prejudice.

BACKGROUND

In February of 2009, a Thurston County jury found Petitioner guilty of first degree robbery while armed with a deadly weapon and second degree vehicle prowling. Dkt. 15, Exhibit 1. Petitioner was sentenced to 210 months of confinement. *See id.* at p. 5. Petitioner challenged this conviction and sentence on direct appeal. Dkt. 15, Exhibit 2. The Court of Appeals of the

1 State of Washington affirmed Petitioner's conviction and sentence, and the Washington State  
2 Supreme Court denied review without comment on November 2, 2010. Dkt. 15, Exhibits 4, 6.

3 Petitioner filed an application for a state collateral attack, a Personal Restraint Petition  
4 ("PRP"), on June 8, 2011. Dkt. 15, Exhibit 7. The Court of Appeals of the State of Washington  
5 dismissed the PRP, and the Washington State Supreme Court denied review. Dkt. 15, Exhibits  
6 10, 12. Petitioner moved to modify the ruling, which was denied by the state supreme court on  
7 September 4, 2013. Dkt. 15, Exhibits 13, 14.

8 On September 2, 2014, Petitioner signed, effectively filing<sup>1</sup>, his federal habeas Petition.  
9 Dkt. 1, p. 15. Respondent maintains the Petition was signed after the statute of limitations  
10 expired, and therefore the Petition is untimely and should be dismissed with prejudice. Dkt. 13.  
11 Petitioner filed a Response to Respondent's Answer, and after additional briefing was ordered,  
12 Respondent filed a Supplemental Response and Petitioner replied. Dkts. 16, 18, 20.

### 13 DISCUSSION

14 Pursuant to the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which became  
15 effective on April 24, 1996, and is codified at 28 U.S.C. § 2241 *et seq.*, a one-year statute of  
16 limitations applies to federal habeas petitions. Section 2244(d)(1)(A) requires a prisoner to file a  
17 habeas petition within one year of "the date on which the [state court] judgment [of conviction]  
18 became final by the conclusion of direct review or the expiration of the time for seeking such  
19 review". A direct review generally concludes and the judgment becomes final either upon the  
20 expiration of the time for filing a petition for writ of certiorari with the United States Supreme  
21 Court, or when the Supreme Court rules on a timely filed petition for certiorari. *Bowen v. Roe*,

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22 <sup>1</sup> Under the prison "mailbox rule," a petition is deemed filed for purposes of AEDPA's statute of  
23 limitations the moment it is delivered to prison authorities for forwarding to the clerk of the district court.  
24 *See Patterson v. Stewart*, 251 F.3d 1243, 1245 n. 2 (9th Cir. 2001).

1 188 F.3d 1157, 1158-59 (9th Cir. 1999). The Act further states “[t]he time during which a  
2 properly filed application for state post-conviction or other collateral review . . . is pending shall  
3 not be counted toward any period of limitation under this subsection.” 28 U.S.C. § 2244(d)(2).

4 Petitioner filed a direct appeal challenging his conviction and sentence. Dkt. 15, Exhibit 2.  
5 The Washington State Supreme Court denied review on November 2, 2010. Dkt. 15, Exhibit 6.  
6 Petitioner did not file petition for writ of certiorari in the United States Supreme Court, making  
7 his direct appeal final on January 31, 2011, the date the time for filing a petition for certiorari  
8 expired. *See* U.S.Sup.Ct. Rule 13 (a writ of certiorari must be filed within 90 days after entry of  
9 the judgment). The AEDPA limitations period began running the next day, February 1, 2011.

10 The statute of limitations ran for 127 days. On June 8, 2011, the date Petitioner executed  
11 his PRP (state post-conviction petition), the statute of limitations was then tolled pursuant to 28  
12 U.S.C. § 224(d)(2). *See* Dkt. 15, Exhibit 7. The statute of limitations, therefore, stopped running  
13 from June 8, 2011 until September 4, 2013-- the date on which Petitioner’s motion to modify the  
14 ruling was denied and his state case became final. The limitations period began to run again on  
15 September 4, 2014. *See Harris v. Carter*, 515 F.3d 1051, 1053 n. 3 (9th Cir. 2008) (finding the  
16 limitations period began when the Washington State Supreme Court denied the petitioner’s  
17 motion to modify the ruling).

18 The AEDPA limitations period ran for 127 days prior to Petitioner filing his PRP, and thus  
19 with tolling under 28 U.S.C. § 224(d)(2), Petitioner had 238 days (for a total of 1 year)  
20 remaining to file his Petition after his PRP became final. In other words, Petitioner had until  
21 April 30, 2014 to file a timely federal habeas petition. Petitioner did not file his Petition until  
22 September 2, 2014, which was a total of 490 days after the 1-year limitations period began  
23 and 125 days after the statute of limitations tolled.  
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1 In his Response to Respondent's Answer, Petitioner asserts he is entitled to equitable  
 2 tolling from September 4, 2013 (the date his state case became final) until January 24, 2014 (the  
 3 date he actually received notice of the state supreme court's final decision). Dkt. 16. Petitioner  
 4 maintains, and supports with affidavits, the clerk of the state court erred by sending his order to  
 5 Thomas Richey, a prisoner at a different facility. *Id.* Mr. Richey states he received mail from the  
 6 Washington State Supreme Court containing the order finalizing Petitioner's state case. *Id.* at p.  
 7 18, Richey Affidavit, ¶ 1. Mr. Richey was placed in segregation and transferred to a different  
 8 facility after he received Petitioner's mail. *Id.* at ¶ 4. When he received his belongings after the  
 9 transfer, Mr. Richey forgot to mail the order to Petitioner. *Id.* After rediscovering the order, Mr.  
 10 Richey mailed the order to his sister with instructions to mail the order to Petitioner. *Id.* at ¶ 5.  
 11 Petitioner states he did not receive the state's final order until January 24, 2014, as a result of the  
 12 state court's error. *Id.* at p. 16, Contreras Affidavit, ¶ 3.

13 A petitioner seeking equitable tolling bears the burden of establishing "(1) that he has been  
 14 pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and  
 15 prevented timely filing." *Holland v. Florida*, 560 U.S. 631, 649, 130 S.Ct. 2549, 2562 (2010)  
 16 (internal citations omitted); *Miranda v. Castro*, 292 F.3d 1063, 1065 (9th Cir. 2002). Equitable  
 17 tolling is appropriate where external forces, rather than the petitioner's lack of diligence, account  
 18 for the failure to file a timely petition. *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999).  
 19 Whether a petitioner is entitled to equitable tolling is a fact-specific inquiry. *Whalem/Hunt v.*  
 20 *Early*, 233 F.3d 1146, 1148 (9th Cir. 2000) (en banc). To receive equitable tolling, a petitioner at  
 21 the very least must show the extraordinary circumstances "were the but-for and proximate cause  
 22 of his untimeliness." *Ansaldo v. Knowles*, 143 Fed. Appx. 839, 840 (9th Cir. 2005).

23 "[A] prisoner's lack of knowledge that the state courts have reached a final resolution of  
 24 his case can provide grounds of equitable tolling if the prisoner has acted diligently in the

1 matter.” *Ramirez v. Yates*, 571 F.3d 993, 997 (9th Cir. 2009) (internal quotations omitted). To  
 2 resolve whether the petitioner is entitled to equitable tolling because of a lack of knowledge  
 3 regarding the state court’s final decision, the Court examines “(1) on what date [the petitioner]  
 4 actually received notice; (2) whether [the petitioner] acted diligently to obtain notice; and (3)  
 5 whether the alleged delay of notice caused the untimeliness of his filing and made a timely filing  
 6 impossible[.]” *Id.* at 998 (internal citations omitted). “Delay alone is insufficient to warrant  
 7 equitable tolling. Petitioner must also show that he acted diligently; for example ‘he made any  
 8 attempt to check on the status of his petition before he received the notice.’” *Aguilera-Guerra v.*  
 9 *Ryan*, 2012 WL 6765589, \* 4 (D. Ariz. Dec. 7, 2012) (quoting *Guillen v. Terhune*, 14 Fed.  
 10 Appx. 865, 867 n. 3 (9th Cir. 2001)).

11 Here, taking Petitioner’s allegations as true, the evidence fails to show Petitioner is entitled  
 12 to equitable tolling. Petitioner had until April 30, 2014 to timely file his Petition. When  
 13 Petitioner allegedly received notice of the state court’s final decision on January 24, 2014, he had  
 14 96 days to file a timely petition. Petitioner fails to explain why he waited until September of  
 15 2014 to file his Petition. There is no evidence, therefore, showing the alleged delay in receiving  
 16 the state court’s final decision made filing a timely petition impossible. Furthermore, there is no  
 17 evidence showing Petitioner acted diligently to obtain notice of the state court’s decision or  
 18 attempted to check the status of his state case.

19 Petitioner has failed to demonstrate a nexus between the delay in receiving the final state  
 20 order and his failure to file a timely federal petition. Accordingly, the alleged delay was not an  
 21 extraordinary circumstance entitling Petitioner to equitable tolling. *See Majano v. Long*, 2015  
 22 WL 1612016, \*8 (C.D. Cal. April 8, 2015) (finding the petitioner was not entitled to equitable  
 23 tolling because, while he was delayed in receiving notice of the finality of his state case, he still  
 24 had four months to file his federal petition and thus the delay did not make it impossible for him

1 to file his federal petition); *Kennedy v. Hernandez*, 2008 WL 4378183, \*8 (C.D. Cal. August 25,  
 2 2008) (finding equitable tolling was not warranted when the petitioner failed to show due  
 3 diligence in inquiring about the status of his state case and, regardless of a delay, still had 60  
 4 days to timely file his petition after receiving the state supreme court's final order).

#### 5 CERTIFICATE OF APPEALABILITY

6 A petitioner seeking post-conviction relief under 28 U.S.C. § 2254 may appeal a district  
 7 court's dismissal of the federal habeas petition only after obtaining a certificate of appealability  
 8 (COA) from a district or circuit judge. *See* 28 U.S.C. § 2253(c). "A certificate of appealability  
 9 may issue . . . only if the [petitioner] has made a substantial showing of the denial of a  
 10 constitutional right." 28 U.S.C. § 2253(c)(2). Petitioner satisfies this standard "by demonstrating  
 11 that jurists of reason could disagree with the district court's resolution of his constitutional  
 12 claims or that jurists could conclude the issues presented are adequate to deserve encouragement  
 13 to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (*citing Slack v. McDaniel*,  
 14 529 U.S. 473, 484 (2000)). Pursuant to this standard, this Court concludes Petitioner is not  
 15 entitled to a certificate of appealability with respect to this Petition.

#### 16 CONCLUSION

17 Petitioner's Petition is untimely as it was filed more than one year after the state court  
 18 judgment became final. There are no extraordinary circumstances in this case requiring the  
 19 application of equitable tolling principles. Therefore, the Petition is barred by the one-year  
 20 statute of limitations period imposed under 28 U.S.C. § 2244(d) and should be dismissed with  
 21 prejudice. No evidentiary hearing is required<sup>2</sup> and a certificate of appealability should be denied.  
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 24 <sup>2</sup> Petitioner previously moved for an evidentiary hearing and the Court concluded an evidentiary  
 hearing is not necessary in this case. Dkt. 10.

1 Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have  
2 fourteen (14) days from service of this Report to file written objections. *See also* Fed. R. Civ. P.  
3 6. Failure to file objections will result in a waiver of those objections for purposes of de novo  
4 review by the district judge. *See* 28 U.S.C. § 636(b)(1)(C). Accommodating the time limit  
5 imposed by Fed. R. Civ. P. 72(b), the clerk is directed to set the matter for consideration on July  
6 10, 2015, as noted in the caption.

7 Dated this 8<sup>th</sup> day of June, 2015.

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10 David W. Christel  
United States Magistrate Judge  
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